IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 826 of 1996

For Approval and Signature:

Hon'ble MR.JUSTICE K.R.VYAS
and
Hon'ble MR.JUSTICE AKSHAY H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgement? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

DEVA TAPU ADADIYA

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 826 of 1996

MR BS SUPEHIA for appellant

MR KC SHAH, ld.APP for Respondent

CORAM : MR.JUSTICE K.R.VYAS
and
MR.JUSTICE AKSHAY H.MEHTA

Date of decision: 28/11/2001

ORAL JUDGEMENT

(Per : MR.JUSTICE K.R.VYAS)

The appellant in this appeal has challenged the judgment and order of conviction and sentence passed by the learned Addl. Sessions Judge, Jamnagar dated 14th August 1996 in Sessions Case No.15 of 1995. The learned trial Judge, after appreciating the evidence, convicted the appellant for the offence under Sec.304 Part-I of the Indian Penal Code and sentenced him to suffer Rigorous Imprisonment for a period of ten years and to pay a fine of Rs.10,000/-, in default of payment of fine, to undergo further Rigorous Imprisonment for two years. The appellant was also found guilty for the offence punishable under Sec.135(1) of the Bombay Police Act and was convicted with a fine of Rs.100/-, in default of payment of fine, the appellant was to suffer Simple Imprisonment for one month. Both the sentences were ordered to run concurrently. The learned trial Judge has also ordered that the fine if recovered from the appellant, an amount of Rs.5,000/- shall be deposited in a Fixed Deposit in the name of the daughter of the deceased, namely, Sumar Masari for a period of ten years.

2. The appellant was charged for the offence punishable under Sec.302 of the Indian Penal Code and under Sec/135(1) of the Bombay Police Act. As per the prosecution case, the deceased Sumar Masari and the appellant Deva Tapu were proceeding at about 8.30 hours to go towards the Mine, where they were employed for digging out the stones from the Mines. They were followed by the informant Lakha Masari and Bhikha Masari, brothers of the deceased. At about 9.00 hrs., the deceased and the appellant had a quarrel with each other and before the informant along with his brother and his nephew Popat Bhikha reached the spot, the appellant inflicted a dagger at the shoulder of Sumar Masari and thereafter another injury was inflicted on the right hand. Thereafter the appellant left the place and run towards the hilly area. The deceased was lying profusely bleeding and was crying that Deva Tapu had inflicted injuries to him by the dagger and it is difficult for him to survive. According to the informant, he and other prosecution witnesses thereafter tried to remove the deceased to the hospital. However, the deceased succumbed to the injuries on the way. The informant thereafter gone to Bhanvad Police Station for lodging the FIR. The FIR No.83 of 1994 was lodged on 18.11.1994 at about 13.00 hrs. Upon receiving the information, Mahipatsinh Hanubha, PW13, who was at village Hathala had rushed to the place of incident for making the preliminary inquiry at village where he found the dead

body of deceased Sumar Masari lying there. After preparing the inquest panchnama at Exh.21, he made preparation for getting Post Mortem to be conducted by the Doctor. In the meantime, PSI came at the place of the incident and took over the investigation. On 20.11.1994, the appellant was apprehended under panchnama at Exh.43 with the muddamal article No.6 having blood stains. The appellant also lodged a complaint which came to be registered vide Exh.37. The appellant was sent for medical treatment to the hospital with a yadi at Exh.36. After completing the investigation, the chargesheet was submitted against the appellant before the learned Judicial Magistrate (First Class), Bhanvad who committed the case to the Court of Sessions.

3. The appellant denied the charge at Exh.2 and claimed to be tried. In his further statement under Sec.313 of the Code of Criminal Procedure, he denied the case of the prosecution and pleaded that since he is having enmity with the informant and his brothers, he has been falsely involved in the present case. The learned trial Judge after appreciating the evidence on record was of the view that the prosecution has failed to establish the charge under Sec.302 of the Indian Penal Code against the appellant. However, according to the learned Judge, the prosecution has established the offence under Sec.304 Part-I of the Indian Penal Code against the appellant. He, therefore, convicted the appellant for the said offence and imposed the sentence as stated in the foregoing paragraphs.

4. Learned Counsel Mr.Supehia appearing for the appellant, after taking us through the entire evidence on record, fairly conceded that it was impossible for him to refute the reasonings recorded by the learned trial Judge convicting the appellant for the offence under Sec.304 Part-I of the Indian Penal Code. He, however, made submissions on the basis of the sentences imposed by the learned trial Judge. In other words, the learned Counsel for the appellant conceded to the order of conviction convicting the appellant for the offence under Sec.304 Part-I. However, he challenged the order of sentence to suffer Rigorous Imprisonment for ten years and fine of Rs.10,000/-, in default of payment, to undergo further Rigorous Imprisonment of two years. In the submission of the learned Counsel, the sentence imposed by the learned trial Judge is quite disproportionate to the proved offence.

5. After having gone through the evidence of PW1-Lakha and PW3 Bhikha, the brothers of the deceased

who have witnessed the incident as they were following the appellant as well as the deceased at a distance of about 40-50' together with the evidence of Dr.Shashikant Sapariya, the Medical Officer of Primary Health Centre, Bhanvad, we are clearly of the opinion that the prosecution has successfully established the involvement of the appellant in commission of the offence when he caused the injuries on the person of the deceased which were in the nature of ante-mortem. There were, in all, three injuries sustained by the deceased, which are as under:

(1) An incised wound of 7 cm x 5 cm x muscle deep and blood vessel deep, horizontal at plantar aspect of middle of right forearm.

(2) A stab wound of 2 cm x 4 cm deep wedge shape downward, backward and outward in direction at the junction of right side of neck and upper border of thorax.

(3) An abrasion of 2 cm x 1 cm at the dorsal aspect of middle phalynx of left index finger.

The medical evidence corroborates the say of the eye witnesses. In our opinion, the learned trial Judge was justified in holding the involvement of the appellant in the commission of the offence. The learned trial Judge while coming to the conclusion held that the prosecution has established the offence against the appellant under Sec.304 of the Indian Penal Code instead of the offence punishable under Sec.302 of the Indian Penal Code and observed that the prosecution has failed to establish the criminal intention on the part of the appellant, however, the appellant was having knowledge on his part. It was also observed by the learned trial Judge after appreciating the evidence of PW1 and PW3 coupled with the documentary evidence at Exhs.37 and 30 that the deceased first started with the appellant and had assaulted the appellant in the beginning and thereafter the appellant inflicted the injuries to the deceased. After having gone through the evidence of PW1 and PW3 and particularly the cross examination, we are also convinced beyond in any manner of doubt that there was a quarrel between the appellant and the deceased before the appellant inflicted injuries to the deceased. On 20.11.1994 the appellant was sent to Dr.Shashikant Sarpariya, PW2 for medical examination where the Doctor has recorded the history of the appellant which the appellant narrated that he was assaulted by deceased Sumar Masari by the stick on 18.11.1994 at about 9 hours in the morning. Exh.37 is

the complaint given by the appellant wherein the appellant has narrated that on 18.11.1994 at about 8.30 hrs. in the morning when he was going to his job at Mine, he was followed by deceased Sumar Masari. The deceased told him that he was having illicit relation with his wife. The said allegation was denied by the appellant, however, the deceased was not satisfied and he started assaulting the appellant with the stick. Thus, from the oral as well as documentary evidence, it is clear that there was a quarrel between the appellant and the deceased prior to the appellant inflicted the injuries to the deceased. The said version of Exh.37 is also corroborated in the history recorded by Dr.Shashikant Sapariya in the medical case papers at Exh.30. From the evidence on record, it is clear that there was no intention on the part of the appellant to kill or commit murder of the deceased as the appellant has used the minimum force and has not taken undue advantage of the situation. Thus, considering the aforesaid facts and circumstances, we are also of the opinion that the present case falls under the exception Clause 1 and 2 of Sec.300 of the Indian Penal Code. Thus, the prosecution has failed to establish the intention on the part of the appellant to commit murder, in our opinion, the prosecution has established the knowledge on the part of the appellant of his act and the consequences thereof while committing the offence. In the facts and circumstances, the learned trial Judge, in our opinion was, justified in not holding the appellant guilty for the offence punishable under Sec.302 of the Indian Penal Code and was further justified in holding the appellant liable for the offence under Sec.304 Part-I of the Indian Penal Code. We, therefore, confirm the order of conviction passed by the learned trial Judge.

6. Reverting back to the submission made by the learned Counsel for the appellant regarding the sentence, we have heard learned Counsel for the appellant as well the learned APP at length. After taking into consideration the facts and circumstances of the case, we are of the opinion that the sentence to suffer Rigorous Imprisonment for ten years and to pay a fine of Rs.10,000/- in default of payment of fine to suffer further Rigorous Imprisonment for two years for the offence punishable under Sec.304 of the Indian Penal Code appears to be quite disproportionate to the proved offence. The appellant being 25 years of age, deserves certain considerations, namely, he has not committed the offence with predetermined mind and on the contrary, the same took place on the provocation by the deceased. The appellant is a married person having a wife and a son and

also having an old aged mother and there is no male member in his family who can look after the family and to take care of them. Taking into consideration the above facts and circumstances, in our opinion, if the order of sentence is suitably modified, it will serve the ends of justice. We, therefore, pass the following order on the point of sentence:

The appellant Deva Tapu Adadiya is held guilty for the offence punishable under Sec.304 Part-I of the Indian Penal Code and is sentenced to suffer Rigorous Imprisonment already undergone by him and to pay a fine of Rs.100/- (Rupees One Hundred only). Accordingly, the order dated 14th August 1996 passed by the learned Addl.Sessions Judge, Jamnagar, in Sessions Case No.15 of 1995 sentencing the appellant to suffer Rigorous Imprisonment for ten years and fine of Rs.10,000/-, in default of payment of fine, to suffer further Rigorous Imprisonment for two years is quashed and set aside. The order of conviction and sentence imposed by the learned trial Judge holding the appellant guilty of the offence punishable under Sec.135(1) of the Bombay Police Act is confirmed.

The appeal is accordingly partly allowed.

(K.R. Vyas, J.)

(Akshay H. Mehta, J.)

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